93-947

No. ____

Supreme Court, U.S.
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In the

# Supreme Court of the United States

OCTOBER TERM, 1993

JAMES P. DAILEY, *Petitioner*

*v.*

UNITED STATES OF AMERICA, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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## QUESTIONS PRESENTED

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as military trial and appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial offices for fixed terms?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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No.____

JAMES P. DAILEY, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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The petitioner, James P. Dailey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered on September 20th, 1993.

## OPINIONS BELOW

The opinion of the United States Court of Military Appeals in *United States v. Dailey*, 37 M.J. 463 (C.M.A. 1993), is reprinted as Appendix A. The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Dailey*, 34 M.J. 1039 (N.M.C.M.R. 1992), is reprinted as Appendix B.

## JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 20, 1993. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles peti-

tioner to seek review of the United States Court of Military Appeals' decision.

## CONSTITUTIONAL PROVISION

The pertinent portion of Art. II, § 2 is set forth in Appendix C.

## STATEMENT OF THE CASE

A military judge, sitting as a general court-martial, convicted Petitioner, pursuant to his pleas, of two specifications of signing false official records and one specification of larceny of military property of the United States, in violation of 10 U.S.C. §§ 907, and 921, respectively.

Thereafter, the military judge sentenced petitioner to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. The convening authority suspended confinement in excess of eight months for one year from the date of trial, but otherwise approved the sentence as adjudged.

Upon subsequent review, the Court of Military Review affirmed petitioner's conviction. *United States v. Dailey*, 34 M.J. 1039 (N.M.C.M.R. 1992).

On appeal pursuant to 10 U.S.C. § 867(a)(3), the United States Court of Military Appeals affirmed the lower court's decision in *United States v. Dailey*, 37 M.J. 463 (C.M.A. 1993).

This petition, like that presented in *United States v. Weiss*, challenges the independence of military trial and appellate judges. Because the *Weiss* petition explained the reasons why this Court should grant review on the questions presented, those reasons are merely summarized below.

## REASONS FOR GRANTING THE WRIT

### I. THE APPOINTMENTS CLAUSE VIOLATION

The Appointments Clause empowers the President to appoint Officers of the United States with the advice and consent of the Senate. U.S. Const. art. II, § 2. Although this is the sole manner in which Principal officers may be appointed, Inferior officers may be appointed by the President alone, the Courts of Law, or the Heads of Departments, if Congress so authorizes. U.S. Const. Art. II, § 2, Cl. 2; *Freytag v. Commissioner*, 111 S.Ct. 2631, 2642 (1991).

Unquestionably, military judges are Officers of the United States and their appointments are governed by the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). *But see Weiss* 36 M.J. at 234–41 (Crawford, J., concurring in the result). Because Petitioner believes that military trial and appellate judges are Principal officers, only the President may appoint them with the advice and consent of the Senate. A functional analysis of the military judge's authority supports this conclusion. Even if military judges are Inferior officers, however, their appointment must be with the advice and consent of the Senate unless Congress says otherwise. Congress has not so spoken in this case.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S.Ct. at 2638. As this Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate*

> *members of the Executive Branch.* . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

*Freytag*, 111 S.Ct. at 2639 (emphasis added).

The validity of the appointment of military judges by the Judge Advocate General is a significant constitutional question which this Court has before it in *Weiss*. This Court should grant review--as it did in *Weiss*--to resolve the dispute as promptly as possible.

This Court should not hold Petitioner's claims waived or forfeited despite his failure to raise these issues below. *See Freytag*, 111 S. Ct. at 2639 (noting that the Court "has exercised its discretion to consider nonjurisdictional claims that had not been raised below.") (citations omitted); *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962). In fact, *Glidden* "expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below . . . ." *Freytag*, 111 S. Ct. at 2639.

## II. THE DUE PROCESS VIOLATION

The reasons this Court should grant review on the second question presented are set out in the *Weiss* petition and are only summarized below. Notably, however, although the two questions presented arise under different constitutional provisions, both defects raise concerns regarding fundamental fairness to a military accused. Moreover, non-compliance with one provision exacerbates the harm caused by non-compliance with the other.

Petitioner disagrees with the Court of Military Appeals' reliance on *Medina v. California*, 112 S. Ct. 2572 (1992), in deciding a Fifth Amendment due process claim.

Petitioner believes that the respect for state legislative judgments and federalism concerns which underpinned *Medina* have no place in a Fifth Amendment Due Process analysis. Regardless, the uncertainty created by *Medina* underscores the need for this Court to settle the issue.

Arguably, a fixed tenure requirement for military trial judges may be impracticable in time of war. But, there is no apparent reason why military appellate judges--all of whom sit in Washington, D.C.--should not enjoy fixed terms of office. Furthermore, neither the government nor the Court of Military Appeals sought to justify indefinite terms of office on grounds of military necessity. Instead, the court below claimed that the independence of military judges was protected in other ways. Importantly, even if these protections exist, they can not be invoked by a military accused much less by the judges themselves.

In short, the Court of Military Appeals failed to adhere to a central tenet of American jurisprudence, *see Tumey v. Ohio*, 274 U.S. 510 (1927), and neglected to recognize the nearly universal existence of fixed terms of office for state criminal trial and appellate judges.

## CONCLUSION

The manner in which military trial and appellate judges are appointed and their lack of fixed tenure present profound constitutional questions. These issues strike at the heart of the military justice system's structural integrity. Accordingly, the Court should issue a writ of certiorari to address each of these important issues of law.

Respectfully submitted,

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December 7, 1993

## APPENDIX A

UNITED STATES, Appellee, v. James P. DAILEY, Sergeant, U.S. Marine Corps, Appellant

No. 68,063
CMR No. 91-1770

U.S. COURT OF MILITARY APPEALS

April 8, 1993, Argued

September 20, 1993, Decided

For Appellant: *Lieutenant Michael C. Pallesen*, JAGC, USNR (argued).

For Appellee: *Lieutenant Commander Stephen A. Stallings*, JAGC USN (argued); *Colonel T.G. Hess*, USMC, and *Commander W.F. Shields*, JAGC, USN (on brief).

*Opinion of the Court*

WISS, Judge:

Appellant pleaded guilty at his general court-martial to two specifications of signing false official records and one specification of larceny of military property of the United States, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 USC §§ 907 and 921, respectively. After accepting the pleas as provident, the military judge sentenced appellant to a bad-conduct discharge, confinement for 1 year, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these

results except for suspending confinement in excess of 8 months for 1 year.

On appeal, the Court of Military Review consolidated the two specifications of signing false official records into the larceny specification. On reassessment of the sentence, *see United States v. Sales*, 22 MJ 305 (CMA 1986), the court affirmed the sentence as approved below. 34 MJ 1039, 1042 (1992).

We granted review to determine whether excess allowances received by appellant were military property. *See* 36 MJ 211 (1992). Twice during his providence inquiry, appellant explicitly acknowledged that the subject of his larceny--the difference between the basic allowance for quarters (BAQ) at the "with dependent" rate and that at the single rate that was paid to him after appellant and his wife had divorced in 1986--"was military property of the United States." Notwithstanding, appellant has maintained on appeal that money appropriated by Congress for payment of BAQ is not "military property" for purposes of Article 121 so as to be subject to the sentence-enhancement provision in paragraph 46e(1)(c), Part IV, Manual for Courts-Martial, United States, 1984 (Change 3). The Court of Military Review disagreed, and so do we.

In *United States v. Hemingway*, 36 MJ 349 (CMA 1993), the accused and a cohort stole United States Treasury checks from the travel pay section of the finance office, forged the names of the payees, and deposited the checks into the cohort's bank account. In the course of considering Hemingway's contention that the checks and the corresponding funds were not "military property" within the meaning of the President's sentencing scheme for violations of Article 121, we reviewed the historical meaning of that term, tracing back from a "Note" in paragraph 46 that incorporates the

definition found in paragraph 32c(1). In the end, we held

> that appropriated funds belonging to the United States Army--even if only being "held" by the Army for immediate disbursement to an individual soldier for duty travel--are within the meaning of "military property of the United States" for purposes of Article 108 and, therefore--through paragraph 32c(1)--for purposes of determining the maximum sentence to confinement for larceny under paragraph 46b(1)(e) and e(1)(c).

*Id.* at 352.

The same result, for the same reasons, obtains here. BAQ funds are appropriated by Congress; their defined purpose is to boost morale and to ensure subsistence of servicemembers and their families. *United States v. Simonds*, 20 MJ 279 (CMA 1985). They are "clearly distinguishable from salary" and, when improperly made, do not transform into the individual's property. *See United States v. Antonelli*, 35 MJ 122, 127 (CMA 1992). These appropriated funds are surely military property just as the appropriated travel funds in *Hemingway* were.

Thus, fully consistent with our analysis in *Hemingway*, we hold that the excess BAQ that appellant admitted to stealing was "military property of the United States" within the meaning of the sentencing provisions of paragraph 46e(1)(c) of the Manual. *Cf. United States v. Schelin*, 15 MJ 218, 220 (CMA 1983) ("In other words, it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is 'military property' within the meaning of Article 108.").

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

## APPENDIX B

UNITED STATES v. James P. DAILEY,
Sergeant (E-5), U.S. Marine Corps

NMCM 91 1770

U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

Decided March 18, 1992

LT PETER VAN HARTESVELDT, JAGC, USNR, Appellate Defense Counsel

LCDR J. RICHARD CHEMA, JAGC, USN, Appellate Government Counsel

Before JONES, Senior Judge, and REED and LAWRENCE, JJ.

REED, Judge:

We have examined the record of trial, the assignments of error,[1] and the Government's reply thereto.

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[1] I. A SENTENCE WHICH INCLUDES A BAD CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE. [FOOTNOTE OMITTED]
II. THE FINDINGS OF GUILTY OF CHARGE II AND THE SPECIFICATION THEREUNDER, ALLEGING LARCENY OF MILITARY PROPERTY, WERE IMPROVIDENT BECAUSE MILITARY ALLOWANCES ARE NOT "MILITARY PROPERTY" AS CONTEMPLATED BY UCMJ ARTICLE 121. *UNITED STATES V. THOMAS*, 31 M.J. 794 (A.F.C.M.R.

Appellant, tried before a general court-martial, military judge alone, was found guilty, pursuant to his pleas, of signing two official records with the intent to deceive, violations of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907, and larceny of U.S. currency of a value in excess of $100.00, military property of the United States, a violation of Article 121, UCMJ, 10 U.S.C. § 921. He was sentenced to confinement for one year, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad conduct discharge.

In his second assignment of error, appellant alleges that his pleas of guilty to Charge II and the specification thereunder, the larceny of military property, were improvident because military allowances, the property stolen, are not "military property" as contemplated by Article 121, UCMJ. Larceny of military property of a value greater than $100.00 carries a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances and confinement for 10 years. Larceny of non-military property contains the same authorized punishment except that the maximum amount of confinement that can be awarded is capped at five years. *See* Paragraph 46e(1), Part IV, Manual for Courts-Martial (MCM), United States, 1984.

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1990); *SEE ALSO UNITED STATES V. SPRADLIN*, 33 M.J. 870 (N.M.C.M.R. 1991).

III. SPECIFICATION 4 OF CHARGE I, ALLEGING FALSE OFFICIAL STATEMENT, IS MULTIPLICIOUS FOR FINDINGS WITH CHARGE II AND ITS SPECIFICATION, ALLEGING LARCENY OF MILITARY PROPERTY. *UNITED STATES V. DOUGAL*, 32 M.J. 863 (N.M.C.M.R. 1991). [FOOTNOTE OMITTED]

The discussion of Article 121--larceny and wrongful appropriation--found in the MCM[2] indicates the definition of "military property" as used therein is to be found in the MCM under the discussion of Article 108 offenses. Article 108, of course, deals with the sale, loss, damage, destruction or wrongful disposition of military property of the United States. *See* Paragraph 32, Part IV, MCM. There we find that "military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States." Paragraph 32c(1), Part IV, MCM.

This Court recently traced the history of the phrase "military property"--*see United States v. Spradlin*, 33 M.J. 870 (N.M.C.M.R. 1991)--and we concluded that the "legislative intent [was] to exclude money from the types of military property involved in offenses resulting from mere neglect or suffering, but to include money in the types of military property involved in offenses resulting from willful misconduct tantamount to theft or fraud." *Id.* at 872. We further noted that

> In joining willful offenses with negligent ones in Article 108, U.C.M.J., and applying them to "any military property of the United States," the Congress appears to have adopted the broad definition of military property reflected

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[2] Para. 46b(1), Part IV, MCM, provides in pertinent part: "[Note: If the property is alleged to be military property, as defined in paragraph 32c(1), add the following element]

(e) That the property was military property."

> in Article of War 60,[3] . . ., and in its successor Article of War 94 and Article for the Government of the Navy 14, quoted in Schelin[4]. . . . Since . . . Article of War 60 and its successors explicitly included "money" among the kinds of "property of the United States furnished or intended for the military service thereof," we are compelled to conclude that, under the right circumstances, money may be alleged as military property. . . .

*Id.*

In *Schelin* the Court of Military Appeals held that retail merchandise of the Army and Air Force Exchange Service was not "military property of the United States." *Schelin* at 220. "In other words, it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is 'military property' within the meaning of Article 108." *Id.*

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[3] Article of War 60 contains the following:

Any person in the military service of the United States who . . . steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, *money*, or other property of the United States, *furnished or intended for the military service thereof* . . . [s]hall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge.
[Emphasis supplied.]

[4] *United States v. Schelin*, 15 M.J. 218 (C.M.A. 1983).

The Court of Military Appeals subsequently expanded on this concept in *United States v. Simonds*, 20 M.J. 279 (C.M.A. 1985). There the Court held that a camera in a ship's store was military property. "In a general sense, all property purchased with federal funds and owned or held by a service is 'military property. [Citations omitted.] We may presume that items purchased with funds appropriated by Congress to a military department fall within the definition of "military property."' *Id.* at 280.

In the case now before us, the appellant stole approximately $ 5,000.00 from the United States by receiving Basic Allowance for Quarters at the with dependent rate even though he was divorced and thus not so entitled. Funds to pay such allowances are appropriated by Congress on an annual basis. *See, e.g.*, Department of Defense Appropriation Act 1992, Pub. L. No. 102-172, 105 Stat. 1150 (1991).

The purpose of such allowances is not only to boost the morale of the service member but also to ensure the actual subsistence of him and his family. It performs a "morale and welfare function which is an integral part of the armed forces. 'Providing for the health, morale, and welfare of the [service member] is as much a military purpose as is providing weapons and ammunition. Indeed, the maintenance of health, morale, and welfare of the [service member] is essential to the successful completion of the command's mission'." *Simonds* at 280. We thus hold that the funds paid as the basic allowance for quarters are military property. The appellant's second assignment of error is without merit.

Appellant, in his third assignment of error, alleges that the false official statements (Article 107 offenses) and the larceny offense (Article 121) are multiplicious for findings. We agree. *See United States v. Dougal*, 32 M.J. 863, 865 (N.M.C.M.R. 1991). The providence inquiry makes it clear

that appellant signed the false documents as a way of continuing the BAQ fraud. This error will be handled in our decretal paragraph.

The sole remaining assignment of error (I) is that a bad conduct discharge is inappropriately severe. We disagree. We specifically find a bad conduct discharge to be appropriate for a 30-year old sergeant of Marines with over 12 years of service who, despite his age and years of experience, engages in a long-term fraud against the U.S. Government.

The findings are affirmed. The two specifications under Charge I, Article 107, are herewith consolidated into Charge II (Article 121) and its specification. *See United States v. Campbell*, 22 M.J. 99 (C.M.A. 1986). Upon reassessment of the sentence pursuant to the principles announced in *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we affirm the sentence adjudged and approved below.

Senior Judge JONES and Judge LAWRENCE concur.

## APPENDIX C

U.S. Const. art. II, § 2

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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*Solicitor General*
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*Washington, D.C. 20530*
*(202) 514-2217*

3PP

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner makes two claims. First, he argues that the military trial and appellate judges in his case were not qualified to hold those positions because they were appointed to them by the Judge Advocate General, in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Pet. 3-4. Second, he contends that his trial and appeal to the Navy-Marine Corps Court of Military Review was fundamentally unfair because the military judges sitting on those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges. Pet. 4-5.

This Court rejected those claims in its recent decision in *Weiss* v. *United States*, No. 92-1482 (Jan. 19, 1994).

There is no need for further consideration of the identical claims raised by petitioner in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
*Solicitor General*

FEBRUARY 1994